



PLANNING COMMISSION STAFF REPORT JUNE 29, 2006

Project: MEDICAL MARIJUANA DISPENSARIES- (PLN2005-00329)

Proposal: To consider a City-initiated Fremont Municipal Code text amendment to prohibit medical marijuana dispensaries within the City of Fremont.

Recommendation: Recommend to City Council based on findings.

Location: Citywide

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Environmental Review: A Negative Declaration was prepared and circulated for this project.

EXECUTIVE SUMMARY:

In late 2004, the City of Fremont adopted a moratorium prohibiting the establishment of medical marijuana dispensaries. Because the moratorium will expire soon, Council is asked to take action to permanently ban the establishment of these dispensaries within the City. In 1996 California voters enacted Proposition 215, the Compassionate Use Act, which protects qualified patients and their primary caregivers from prosecution under California laws for possession or cultivation of marijuana to treat serious illness pursuant to a doctor's recommendation. Several years later, in 2003, the state legislature enacted implementing legislation to allow qualified patients and caregivers to obtain identification cards that insulate them from arrest for cultivation and/or use of marijuana for authorized medical purposes. Although not expressly authorized under these laws, some people used this legal backdrop to set up medical marijuana dispensaries where qualified patients and caregivers could purchase marijuana for medical use. Unfortunately, these dispensaries have resulted in negative secondary impacts to communities, including drug-related crime and use of marijuana by those without medical need.

Moreover, under federal law, marijuana has no currently accepted medical use, and the cultivation, possession, or distribution of marijuana is prohibited. Congress has not changed this prohibition despite the passage of medical marijuana laws in a number of states. The ongoing conflict between federal and state law on this subject has created a dilemma for local governments and their law enforcement agencies, particularly with regard to medical marijuana dispensaries. Some cities have attempted to regulate these types of businesses by establishing location restrictions and operational standards. Others have adopted ordinances that prohibit them altogether.

The City's moratorium will expire September 28, 2006. Under state law, it may not be continued beyond that date. The conflict between State and federal law continues, with no resolution in sight. The most recent decision from the United States Supreme Court essentially upholds the federal prohibition against the use of marijuana for medical purposes. City staff recommends that the Planning Commission recommend and the City Council enact an ordinance prohibiting the establishment of any medical marijuana dispensaries within the City, consistent with federal law and the public health, safety and welfare.

BACKGROUND AND PREVIOUS ACTIONS:

Under the *Controlled Substances Act*, enacted by Congress in 1970, marijuana is classified as a Schedule I controlled substance. This classification is based on a determination that marijuana (1) has a high potential for abuse, (2), has no currently accepted use for medical treatment, and (3) is not accepted as safe, even when used under medical supervision. This federal law makes it illegal to import, manufacture, distribute, possess, or use marijuana in the United States. Use of marijuana is also prohibited under the "*California Uniform Controlled Substances Act*," passed in 1972.

On November 5, 1996, California voters passed Proposition 215, the "*Compassionate Use Act of 1996*," with the stated intent of ensuring that seriously ill individuals have the right to obtain and use marijuana for medical purposes when recommended by a physician. This voter initiative exempts patients and their primary caregivers from prosecution under State laws that otherwise prohibit the cultivation or possession of marijuana.

Shortly after the Proposition 215 passed, medical marijuana dispensaries began appearing in Oakland, San Francisco and Santa Cruz. The federal Drug Enforcement Agency (DEA) took an aggressive role to close these businesses as being in violation of federal law. This enforcement activity resulted in a number of significant court decisions. The first of these decisions was *United States v. Oakland Cannabis Buyers Cooperative, et al.* (2001) 532 U.S. 483. In that case, the United States Supreme Court held that there is no medical necessity exception to the prohibition against possession and use of marijuana under federal law, even when the patient is "seriously ill" and lacks alternate sources of relief. In *People v. Mower* (2002) 28Cal.4th 457, the California Supreme Court held that although Proposition 215 exempts qualified individuals from certain State marijuana laws, it does not grant an absolute immunity from arrest. Instead, it provides a limited immunity from prosecution, and may provide a basis for a pretrial motion to set aside an indictment or a defense at trial.

In 2003, the State legislature passed Senate Bill 420, effective January 1, 2004, which established the Medical Marijuana Program. This legislation creates a voluntary system for qualified patients and their caregivers to obtain identification cards, issued by counties, that will insulate them from arrest for violations of State law relating to marijuana. It does not expressly authorize establishment of medical marijuana dispensaries. Nevertheless, after passage of SB 420 a number of people opened, or attempted to open, medical marijuana dispensaries in cities throughout the state.

Last summer, in June 2005, the United States Supreme Court rendered an opinion in the case of *Gonzales v. Raich* (2005) 125 S.Ct. 2201. In the *Raich* case, federal agents seized and destroyed marijuana plants that were being grown for personal medical use. The plaintiffs sued to prohibit enforcement of the Controlled Substances Act to the extent that it interfered with their medical use of marijuana as permitted under California law. The Ninth Circuit Court of Appeals held that federal law enforcement authorities could not enforce the Controlled Substances Act against these individuals because it exceeded Congressional authority under the commerce clause of the United State Constitution. The Supreme Court reversed, holding that the Commerce Clause does allow Congress to prohibit cultivation or use of marijuana for medical purposes authorized by California law. Although the Supreme Court's analysis focused narrowly on the scope of Congressional authority under the commerce clause, the practical effect of the *Raich* decision is that federal law enforcement officers may continue to enforce federal drug laws against Californians who cultivate or use medical marijuana.

In addition, there are several other cases pending in California (both state and federal courts) that, when decided, may offer direction to local governments regarding medical marijuana. Definitive rulings on these cases are not likely to occur soon. Brief descriptions are as follows:

- Americans for Safe Access (ASA), the largest national grassroots coalition working solely to protect the rights of patients and doctors to use marijuana for medical purposes, has filed suits against the following cities which adopted ordinances banning medical marijuana dispensaries: Concord, Fresno, Susanville, Placerville and Pasadena. ASA claims that an outright ban conflicts with State law, which allows medical marijuana use for medical purposes. Several cities have countered that federal law, which makes marijuana use illegal in all circumstances, preempts the Compassionate Use Act. After the City of Concord filed papers in support of this position, ASA recently dismissed that action. The ASA also recently dismissed their lawsuit against the City of Susanville for unspecified reasons. Other cases are still pending.
- West Hollywood is still in litigation with the federal government in the Ninth Circuit Court of Appeals. In 2001, federal agents raided a local medical marijuana clinic and seized property owned by the City of West Hollywood. The federal government claims that the City should have taken steps to assert their ownership by properly managing the property and prohibiting the cannabis club because it was operating in violation of federal law.
- In late March 2006 the Ninth Circuit court heard oral arguments in a case filed on behalf of an ill California woman (who suffers from scoliosis and a brain tumor), whose doctor says that marijuana is the only medicine keeping her alive. The argument under the “right to life” theory asserts that marijuana should be allowed if it is the only viable option to keep a patient alive or free from excruciating pain.
- The counties of San Diego and San Bernardino have filed a lawsuit against the State alleging the California Compassionate Use Act is unconstitutional because federal law preempts it.

Notwithstanding the fact that federal law currently prohibits the use of marijuana for medical purposes, and the DEA’s enforcement efforts, medical marijuana dispensaries have continued to be established. In general, California cities have reacted differently to the conflicting laws and the establishment of dispensaries. As of April 2006, twenty-two cities and two California counties have banned medical marijuana dispensaries, while twenty-four cities and five counties allow dispensaries in certain regulated circumstances. Sixty-two cities and six counties still have moratoria in effect.

Those cities that have allowed medical marijuana dispensaries have seen a number of negative impacts on their communities, despite their attempts to regulate secondary impacts. As previously described, marijuana use has been illegal for more than thirty years, and the street value remains such that an established illicit market highly correlated with other forms of crime continues to exist. When the moratorium was brought to Council in November of 2004, the staff report noted that:

“...some local agencies have reported increases in illegal drug activity, illegal drug sales, robbery of dispensaries, loitering around dispensaries, falsely obtained identification cards, marijuana being grown illegally on public lands, robbery of private marijuana gardens, and other increases in criminal activity. Medical marijuana dispensaries have resulted in increased demands for police response, and have created health, safety, and welfare concerns.”

Based upon subsequent research, these negative impacts continue. Crimes highly correlated with medical marijuana dispensary operations have been committed in surrounding communities. The following is a sample of individual types of cases that have occurred since that date:

1. On June 30, 2005, a marijuana dispensary employee leaving work at the Collective Cannabis Club in Cherryland (one of six in unincorporated Alameda County) was leaving work when a masked gunman opened fire on his car. The Alameda County Sheriff's Department indicated that this was one of six such incidents reported at these clubs in the first half of 2005.
2. On August 8, 2005, three employees and three customers were tied up at a Hayward club during an armed robbery.
3. On October 7, 2005 and October 9, 2005, there were two burglaries of medical marijuana dispensaries in unincorporated Alameda County near Hayward.
4. Also in October of 2005, two juveniles were contacted after being observed near a dispensary wearing heavy coats and ski masks. A search revealed a replica 9mm pistol. Both juveniles were found to be in possession of marijuana.
5. In briefs to policymakers when adopting ordinances, the Police Departments of several neighboring cities have expressed general concern about the relatively high incidence of crime associated with medical marijuana dispensaries.

Additionally, investigations into illegal distribution of drugs have led enforcement agencies to medical marijuana dispensaries from which drugs are being diverted either by "patient" resale to people without prescriptions, by armed robbery of facilities' stocks, or by active collusion of operators with dealers in the illegal market. For instance, on June 15, 2005, the head of the San Francisco Police Department's Bayview station noted that medical marijuana dispensaries had been used as a cover for illegal sales. On December 12, 2005, Drug Enforcement Administration agents raided 13 medical marijuana dispensaries in the San Diego area, indicating that the dispensaries had been operating as a front for the distribution of marijuana. A statement from the Chief of Police for the City of Fremont addressing the impacts of medical marijuana dispensaries upon the community and law enforcement is attached as Informational Enclosure 2.

City of Fremont Actions Taken to date

On September 28, 2004, the Fremont City Council unanimously approved Ordinance Number 29-2004, an urgency ordinance placing a 45-day moratorium on medical marijuana dispensaries that might seek to locate in the City of Fremont. The moratorium was extended for a total of twenty-four months by a unanimous vote of the Council, adopting Ordinance Number 35-2004 on November 2, 2004. Both ordinances became effective upon adoption. The moratorium will expire on September 28, 2006. Pursuant to state law, it may not be extended beyond the two-year period.

PROJECT DESCRIPTION:

The proposed Zoning Text Amendment would add a definition for "medical marijuana dispensaries" to the Zoning Ordinance and ban them from all zoning districts within the City. This amendment does not address individual's use or cultivation of medical marijuana, because such non-commercial use is not subject to zoning restrictions. Applicable federal, State, and local laws continue to regulate this personal activity.

PROJECT ANALYSIS:

General Plan Conformance:

The proposed text amendment is consistent with the General Plan goal to maintain a high quality of life for Fremont residents and to promote public safety and welfare.

Zoning Regulations:

Article XI, Section 7 of the California Constitution reserves to cities broad “police power” to determine how best to protect the public health, safety, morals and general welfare of its citizens, and grants each City the authority to “make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws.” The proposed amendment prohibiting medical marijuana dispensaries is consistent with both federal and state law, in that it acknowledges the federal law prohibition of marijuana and is aimed at addressing drug-related crime and non-medical marijuana use.

Environmental Review:

An Initial Study found that there were no significant environmental impacts associated with the proposed projects. A Negative Declaration was therefore prepared and circulated for this project.

PUBLIC NOTICE AND COMMENT:

Public hearing notification is applicable. *The Argus* published a Public Hearing Notice on June 15, 2006. In addition, one public hearing notice was mailed as a courtesy to an interested party—Americans for Safe Access.

ENCLOSURES:

Exhibits:

- Exhibit "A" Draft Negative Declaration
- Exhibit "B" Zoning Text Amendment

Informational Items:

1. Initial Study
2. Fremont Police Department assessment of medical marijuana dispensary impacts on law enforcement services

RECOMMENDATION:

1. Hold public hearing.
2. Recommend the City Council find the initial study has evaluated the potential for this project to cause an adverse effect -- either individually or cumulatively -- on wildlife resources. There is no evidence the proposed project would have any potential for adverse effect on wildlife resources.

3. Recommend the City Council approve Negative Declaration PLN2005-00329 and find this action reflects the independent judgment of the City of Fremont.
4. Recommend that the City Council find Zoning Text Amendment PLN2005-00329, as shown on Exhibit "B," is in general conformance with the general plan.
5. Recommend that the City Council find that the public necessity, convenience and general welfare require the adoption of Zoning Text Amendment PLN2005-00329 to ban medical marijuana dispensaries because it is consistent with federal law and protects the public from drug-related crime and non-medical marijuana use.
6. Recommend Zoning Text Amendment PLN2005-00329, as shown on Exhibit "B," to the City Council.